

Senate Bill 93  
Wednesday, January 14, 2009  
Presented by Bill Schenk  
Natural Resources Committee

SENATE NATURAL RESOURCES  
EXHIBIT NO. 2  
DATE Jan. 14, 2009  
BILL NO. SB 93

Mr. Chairman and committee members, for the record I am Bill Schenk, Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP).

The Department of Fish Wildlife and Parks supports Senate Bill 93. This bill simplifies the process of obtaining a new ground water permit in a closed basin because an applicant would not have to go through the exercise of identifying individual water right holders who would be adversely affected and determining exactly how to prevent that adverse affect. Instead, an applicant would simply identify the diminishment to surface water flow, and replace that flow at times when not all the existing water rights on that surface water are fully satisfied. It also relieves the burden on existing water users, because they will not have to argue that a diminishment of surface flow that is calculable, but not measurable, will not hurt them. In effect, it guards against the cumulative effects of numerous small diminishments to surface flow.

However, I want to be clear that this is not the strict bucket for bucket surface flow replacement that FWP and others have advocated in the past. Rather, it only requires surface water replacement when someone on the affected surface water source is not able to fully exercise their water rights. In other words, when water is legally available, the new permittee would not need to augment the surface water flow.

Speaking from experience, as an attorney who represents an objector, I can tell you that many applicants are taking the simpler approach anyway; they calculate their expected consumption, and augment surface water to the extent of that consumption. In practice, this change will likely have very little effect on most applicants.

Finally, I would offer one caution. The bill would exempt nonconsumptive uses of ground water from the requirement to perform hydrogeologic assessments. The definition of "nonconsumptive" has a history of debate. I would encourage an amendment that defines "nonconsumptive use" for purposes of 85-2-360 as a use that returns 100% of the water to the same aquifer in approximately the same location, such as a ground source heat pump.  
Thank you.